Supreme Court, U.S.
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No. 95-1828

In the Supreme Court of the United States

OCTOBER TERM, 1995

CERTAIN REAL PROPERTY LOCATED AT 11869 WESTSHORE DRIVE, ETC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the civil forfeiture under 21 U.S.C. 881(a)(7) of real property that was used to facilitate multiple drug transactions satisfied the Excessive Fines Clause of the Eighth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-20a) is reported at 70 F.3d 923. The memorandum and order of the district court (Pet. App. 29a-38a) is reported at 848 F. Supp 107.

JURISDICTION

The judgment of the court of appeals was entered on December 6, 1995. A petition for rehearing was denied on January 24, 1996. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on April 23, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In the United States District Court for the Eastern District of Michigan, the government filed a civil forfeiture complaint pursuant to 21 U.S.C. 881(a)(7) against the real property located at 11869 Westshore Drive, Putnam Township, Livingston County, Michigan, the residence of Neal and Kathryn Duprie.[1] The district court granted the government's motion for summary judgment and ordered forfeiture of the property to the government. Pet. App. 29a-38a. The court of appeals affirmed. *Id.* at 3a-20a.

1. In April 1992, the Livonia Police Department received information that Neal Duprie was a marijuana dealer. The police made a controlled purchase of marijuana from Duprie where he worked. Thereafter, a confidential informant purchased multiple pounds of marijuana from Duprie on the curtilage of Duprie's property. Based on the purchases at Duprie's work and at his residence, the police obtained a search warrant for two lots owned by the Dupries, one containing their house and another a pole barn. Pet. App. 4a.

From the residence, the police seized undetermined amounts of marijuana (found in the study, master bedroom, the guest room, the kitchen, and the living room), $8,380 in cash (which included some of the

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[1] Section 881(a)(7) subjects to forfeiture to the United States "[a]ll real property * * * which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner."

money used in the controlled purchases), and several weapons. They also seized from a "fanny pack" some marijuana and Kathryn Duprie's driver's license. From the pole barn, the police seized approximately 25 pounds of marijuana. Pet. App. 5a-6a, 31a-32a. The Dupries were arrested and prosecuted in state court. Neal Duprie was sentenced to eight months' imprisonment; Kathryn Duprie received a fine. *Id.* at 6a.

On June 17, 1992, the United States instituted a civil forfeiture action against the properties containing the residence and pole barn, and the Dupries filed a claim to the property. Following discovery, the government moved for summary judgment. As part of its case, the government presented unrebutted evidence that a confidential informant twice called the Duprie residence to arrange for two separate purchases of marijuana; that Neal Duprie instructed the informant to come to the residence to complete the sale; that at the time of the sale at the residence, the informant bought from Duprie five pounds of marijuana at $1,650 per pound, and also paid Duprie $3,300 for the earlier purchase at Duprie's place of employment. Pet. App. 4a, 6a-8a, 32a-33a.

2. The Dupries moved to dismiss the forfeiture action as to the residence. They relied on *Austin* v. *United States*, 509 U.S. 602 (1993), which held that the Eighth Amendment's Excessive Fines Clause applies to forfeiture proceedings under Section 881(a)(7). Pet. App. 30a, 35a.[2] The district court denied the motion to dismiss, granted summary judgment for the government, and ordered the forfeiture of the pro-

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[2] The Dupries conceded that the pole barn was forfeitable and challenged only the forfeiture of the residence. Pet. 5; Pet. App. 7a.

perty. *Id.* at 21a-38a. The district court noted that *Austin* had declined to establish a test for determining when a forfeiture is constitutionally excessive, instead leaving the question open for "lower courts" to "determin[e] * * * in the first instance." *Id.* at 35a; see also 509 U.S. at 622-623. The district court then observed that, after *Austin*, some courts had adopted a "proportionality" test that compared the value of the property with the nature of the offense, whereas other courts, following Justice Scalia's concurring opinion in *Austin*, had employed an "instrumentality" test that considered whether the forfeited property was sufficiently related to the offense to render the property forfeitable. Pet. App. 36a.[3]

The district court concluded that the forfeiture of the Duprie's property satisfied both tests. The court reasoned that the forfeiture satisfied the "instrumentality" test endorsed by Justice Scalia, because the record showed "that the residence was used to facilitate at least two drug sales in [a] short span of time," and that "the house was used as the 'sales office' in which sales of marijuana were arranged, whereas the pole barn was used as the 'warehouse', to store the marijuana." Pet. App. 36a.

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[3] In *Austin*, Justice Scalia stated that the test under the Eighth Amendment should be "not *how much* the confiscated property is worth, but *whether* the confiscated property has a close enough relationship to the offense." 509 U.S. at 628 (concurring opinion). The majority in *Austin* responded by stating that "[w]e do not rule out the possibility that the connection between the property and the offense may be relevant, but our decision today in no way limits the Court of Appeals from considering other factors in determining whether the forfeiture * * * was excessive." 509 U.S. at 623 n.15.

The district court held that the forfeiture also complied with the "proportionality" test that considered the value of the forfeited property. Under that test, the court reasoned that the government appraised the value of the house at $85,000 and the Dupries had valued their house between $85,000 and $105,000. The court also found that "the retail value of the thirty-two pounds of marijuana involved, twenty-six pounds stored in the pole barn and six pounds involved in transactions, ranged from $64,000 to $89,000." Pet. App. 36a-37a. The court concluded that "had the Dupries been charged federally, they could have been subject to fines of $250,000," and that "[f]orfeiture of the house is the functional equivalent of, at most, a fine of $85,000." *Id.* at 37a.

3. The court of appeals affirmed. Pet App. 3a-20a. The court held that the district court had conducted an "appropriate analysis to determine whether the forfeiture of the house would be a violation of the Eighth Amendment." *Id.* at 20a. The court of appeals reasoned that the district court had determined that "the house was an instrument of the Dupries' marijuana trafficking" and, thus, "the district court properly found a 'nexus' between the Dupries' illegal activities and the house located on the Property." *Id.* at 19a. The court of appeals also concluded that the value of the house was commensurate with the value of the marijuana involved in the case, and that the value of the house did not exceed the potential $250,000 fine that would have applied had the owners been charged with a federal offense. *Id.* at 19a-20a. The court of appeals noted that "[s]ince the *Austin* decision, no single test has been universally accepted by the federal judiciary" to determine whether an *in rem* forfeiture violated the Eighth Amendment, *id.* at

10a, and stated that it likewise would not establish a single test for the Sixth Circuit "because of the factually intensive nature of these types of cases." *Id.* at 20a.

ARGUMENT

Petitioner contends that the Court should grant certiorari in this case "to resolve a growing split" in the circuits concerning the appropriate test to determine whether an *in rem* forfeiture violates the Excessive Fines Clause of the Eighth Amendment. Pet. 6. Courts of appeals have applied differing tests to assess the validity of civil forfeitures under the Eighth Amendment. This is not the appropriate case to establish a definitive test, however, because petitioner would not be entitled to relief under any test. Indeed, the petition neither urges this Court to adopt a particular test nor suggests that application of a particular test would yield a result different from the decisions below. Accordingly, further review is unwarranted.

In considering whether an *in rem* forfeiture violates the Excessive Fines Clause, two courts of appeals have applied a multi-factored test that combines instrumentality and proportionality concepts. The Second Circuit in *United States* v. *All Right, Title Interest in Real Property*, 77 F.3d 648 (1996), listed the following relevant factors:

> (1) the harshness of the forfeiture (*e.g.* the nature and value of the property and the effect of forfeiture on innocent third parties) in comparison to (a) the gravity of the offense, and (b) the sentence that could be imposed on the perpetrator of such an offense; (2) the relationship between the property and the offense, including whether use of the

> property in the offense was (a) important to the success of the illegal activity, (b) deliberate and planned or merely incidental and fortuitous, and (c) temporally or spatially extensive; and (3) the role and degree of culpability of the owner of the property.

Id. at 659 (quoting *United States* v. *Milbrand*, 58 F.3d 841, 847-848 (2d Cir. 1995)). Similarly, the Ninth Circuit in *United States* v. *6380 Little Canyon Road*, 59 F.3d 974 (1995), has adopted a threshold instrumentality test, followed by a proportionality test that compares the worth of the property to the culpability of the owner under the following criteria:

> (1) the fair market value of the property;
> (2) the intangible, subjective value of the property, e.g. whether it is the family home; and
> (3) the hardship to the defendant * * *
>
> [and]
>
> (1) whether the owner was negligent or reckless in allowing the illegal use of his property; or
> (2) whether the owner was directly involved in the illegal activity, and to what extent; and
> (3) the harm caused by the illegal activity, including (a) * * * the amount of drugs and their value, (b) the duration of the illegal activity, and (c) the effect on the community.

Id. at 985-986.[4]

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[4] Although not deciding the issue, the Third and Eighth Circuits have suggested that they would adopt a test that combines both proportionality and instrumentality elements. *United States* v. *RR #1, Box 224*, 14 F.3d 864, 873-876 (3d Cir. 1994); *United States* v. *9638 Chicago Heights*, 27 F.3d 327, 330 (8th Cir. 1994).

In contrast, in *United States* v. *Chandler*, 36 F.3d 358, 362-366 (1994), cert. denied, 115 S. Ct. 1792 (1995), the Fourth Circuit, relying on Justice Scalia's concurring opinion in *Austin*, held that an instrumentality test is the principal factor in determining whether an *in rem* forfeiture satisfies the Eighth Amendment. *Chandler* reasoned that "[t]he question of excessiveness is * * * tied to the 'guilt of the property' or the extent to which the property was involved in the offense, and not its value." 36 F.3d at 364. The Fourth Circuit concluded that the instrumentality test should consider three factors:

> (1) the nexus between the offense and the property and the extent of the property's role in the offense, (2) the role and culpability of the owner, and (3) the possibility of separating offending property that can be readily separated from the remainder.

Id. at 365. Conversely, the Eleventh Circuit has held that a proportionality test alone should determine whether an *in rem* forfeiture is constitutionally excessive. *United States* v. *427 and 429 Hall Street*, 74 F.3d 1165, 1170 (1996).

The differing approaches that the courts of appeals have adopted do not call for this Court's review in this case. Under any of the above tests, the forfeiture of the Dupries' residence comports with the Eighth Amendment. The forfeiture satisfies an instrumentality test because the property was closely related to the illegal drug activity. The house was used as a sales office to arrange for multiple deals of multiple-pounds of marijuana, while the pole barn was used to store marijuana. The total quantity of marijuana involved was 32 pounds. In sum, the owners used the

residence as an integral part of an extensive marijuana trafficking business.

The forfeiture also was constitutional under a proportionality test. The impact of the forfeiture was commensurate with the culpability of the owners. The value of the property ranged from $85,000 to $105,000; the value of the 32 pounds of marijuana involved in this case was $64,000 to $89,000. Both owners were convicted of a drug offense in state court, which demonstrated that they knowingly used the property to facilitate their drug business. See also Pet. App. 32a (district court's noting owners' admissions of "drug trafficking activities in the residence"). If the owners had been convicted of federal drug crimes, they could have been fined up to $250,000. See 21 U.S.C. 841(b)(1)(D) (authorizing a fine of $250,000 for an offense involving less than 50 kilograms of marijuana). Other circuits employing a proportionality test have upheld similar forfeitures. See *United States* v. *All Right, Title Interest in Real Property*, 77 F.3d at 659 (upholding forfeiture of realty in which owner had interest of up to $500,000 where value was at most one-fourth of potential fine under federal drug laws); *United States* v. *427 and 429 Hall Street*, 74 F.3d at 1172-1173 (upholding forfeiture of property worth $65,000 because owner could have faced fine of $40,000 and owner was found with marijuana, cash, a weapon, and near a school). Moreover, because the forfeiture was constitutional under the instrumentality and proportionality tests, it also was constitutional under a combination of these tests.[5]

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[5] Further review may also be premature because courts of appeals have not yet had the opportunity to consider two

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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recent cases of this Court concerning the constitutionality of civil forfeitures, *Bennis* v. *Michigan*, 116 S. Ct. 994 (1996), and *United States* v. *Ursery*, No. 95-345 (June 24, 1996). *Bennis* rejected the claim that an innocent owner has a due process defense to the forfeiture of property that "facilitated and was used in criminal activity." 116 S. Ct. at 1001. *Ursery* held that a civil forfeiture under 21 U.S.C. 881(a)(7) following a criminal conviction did not violate the Double Jeopardy Clause. *Ursery*, slip. op. 24-25. Although neither *Bennis* nor *Ursery* addresses the Excessive Fines Clause, the decisions could have some implications for this Clause. See, *e.g.*, *Bennis*, 116 S. Ct. at 1010 (Stevens, J., dissenting) (stating that the majority opinion was "dramatically at odds" with *Austin*, and suggesting that *Bennis* rendered owner's blameworthiness and the property's value irrelevant to an Eighth Amendment challenge).